Supreme Court U.S.
FILED
JAN 15 2003
OFFICE OF THE CLERK

No. 02-258

IN THE

# Supreme Court of the United States

SUSAN JINKS,

*Petitioner,*

*v.*

RICHLAND COUNTY,

*Respondent.*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

## BRIEF FOR RESPONDENT

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## QUESTION PRESENTED

Whether 28 U.S.C. § 1367(d), the tolling provision of the federal supplemental jurisdiction statute, is constitutional as applied to a political subdivision of a State where the statute enlarges the State's limited waiver of sovereign immunity under state law for itself and its political subdivisions.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant portions of the United States Constitution as well as 28 U.S.C. § 1367 have been reproduced at Appendix F in the Petition for a Writ of Certiorari.

Moreover, certain provisions of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* (Supp. 2002), are reproduced in that same appendix. However, the South Carolina Supreme Court also cited S.C. Code Ann. § 15-78-100(a) in the decision below. That statute provides as follows:

> Section 15-78-100 When and where to institute action; requirement of special verdict specifying proportionate liability to multiple defendants
>
> (a) Except as provided for in Section 15-3-40, an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered. Provided, that if a claim for damages was filed and disallowed or rejected an action for damages filed under this chapter, based upon the same occurrence as the claim, may be instituted within three years after the loss was or should have been discovered.

## STATEMENT OF THE CASE

The petitioner, Susan Jinks, as the Personal Representative of the Estate of Carl Jinks, brought a survival action and a wrongful death action against Richland County and Dr. Charles Eskridge. The claims arise out of the death of Carl Jinks on October 18, 1994, while incarcerated at the Richland County Detention Center.

The petitioner originally commenced an action in the United States District Court asserting federal constitutional claims under 42 U.S.C. § 1983 and supplemental state law claims. The respondent, Richland County, and other defendants filed motions for summary judgment in that action. By order entered on November 20, 1997, United States District Judge Matthew J. Perry, Jr. granted summary judgment for Richland County on the federal constitutional claims. An order dismissing the supplemental state law claims without prejudice was entered on December 3, 1997. Jinks then appealed to the Fourth Circuit Court of Appeals which affirmed the district court's rulings. *Jinks v. McCaulley*, 163 F.3d 598 (1998) (table). (Pet. App. A at 13a).

Following the dismissal of the supplemental state claims and while the federal appeal was pending, the petitioner filed an action in the Court of Common Pleas for Richland County. That action was filed on December 19, 1997, which was less than thirty days after the dismissal of the supplemental state law claims in the district court.

Following discovery, the case proceeded to trial before Judge L. Henry McKellar and a jury commencing on November 8, 1999. At the close of each side's case-in-chief, the respondent moved for a directed verdict. Those motions



were denied. The jury ultimately returned a defense verdict on the survival action for both defendants. The jury returned a defense verdict on the wrongful death action for Dr. Charles Eskridge. However, the jury returned a verdict of $80,000 actual damages in favor of the petitioner and against Richland County on the wrongful death action. The respondent thereafter filed post-trial motions, including a motion for judgment notwithstanding the verdict based upon a statute of limitations defense. Those motions were also denied by the trial judge.

An appeal was filed to the South Carolina Court of Appeals. The appeal was then certified for immediate review by the South Carolina Supreme Court. By its decision issued April 22, 2002, the South Carolina Supreme Court reversed the trial court and ruled that the petitioner's negligence claim was barred by the two-year statute of limitations under the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-100(a) (Supp. 2002). The court concluded that the tolling provision set forth in 28 U.S.C. § 1367(d) as applied to a political subdivision such as Richland County was unconstitutional.

## SUMMARY OF ARGUMENT

The South Carolina Supreme Court ruled that the extension of the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d), to a political subdivision of the State of South Carolina was beyond the powers delegated to Congress under Article III in conjunction with the Necessary and Proper Clause. As a result, Section 1367(d) contravenes principles of state sovereignty protected by the Tenth Amendment.

The analysis applied by the court below is correct. Article III does not provide an explicit source of power authorizing Congress to extend Section 1367(d) to claims against a political subdivision of the State of South Carolina. Under South Carolina state law, of which the court below is the final arbiter, a political subdivision such as the respondent is entitled to sovereign immunity originally derived from English common law and presently codified in the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq*. (Supp. 2002). In enacting the Tort Claims Act, the South Carolina General Assembly waived state law sovereign immunity for the State and its political subdivisions with certain exceptions, limitations, and conditions. One of the conditions on this limited waiver requires that a state court action for damages "must be brought within two years of the date of loss." *See* S.C. Code Ann. § 15-78-100(a) (Supp. 2002). This Court has held that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Therefore, as held by the court below, once the limitations period under the Tort Claims Act expired, the respondent was entitled to absolute sovereign immunity under state law.

Section 1367(d) allowed for the petitioner to commence her state law claims against the respondent in state court beyond the two-year prescribed period and at a time where the respondent enjoyed absolute sovereign immunity under state law. Section 1367(d), therefore, resurrected a purely state law claim that was otherwise barred under state law. This result represents an unconstitutional intrusion on state sovereignty. Congress lacks the authority under Article III and the Necessary and Proper Clause to abrogate the sovereign immunity enjoyed by a State and its political subdivisions under state law and as applied to a state law claim litigated in a state court.



The petitioner and the United States disregard the fact that the two-year limitations period established by the Tort Claims Act creates not only the deadline for filing an action but also sets the parameters for a limited waiver of state law sovereign immunity. They contend that the respondent is not entitled to federal constitutional sovereign immunity under the Eleventh Amendment; however, this case does not involve an action brought in federal court with federal claims. The sovereign immunity claimed by the respondent is derived from state law and is asserted only with respect to state law claims litigated in state courts. The Eleventh Amendment, therefore, has no bearing on the issue before this Court and does not preclude the respondent from asserting the unconstitutional intrusion on state sovereignty effected by Section 1367(d) in this case.

The South Carolina Supreme Court did not reach the broader issue as to whether Congress has the power under Article III and the Necessary and Proper Clause to alter a statute of limitations established under state law and applicable to a state law claim only. Nonetheless, the respondent submits that Congress is not delegated authority under Article III to alter or amend any state statute of limitations. Article III authorizes Congress to regulate the jurisdiction and establish the procedures for "inferior courts"; however, historically this Court has not treated state courts as "inferior courts" within congressional control. Section 1367(d) is an attempt by Congress to effect practice and procedure in state courts. It compels state courts to entertain claims that would otherwise be barred by operation of state law. This attempt to commandeer the state courts represents an impermissible intrusion into state sovereignty and is in violation of the Tenth Amendment.

The utility of Section 1367(d) in allowing for federal courts to dismiss state supplemental claims without concern for a potential statute of limitations defense is no basis for trampling principles of state sovereignty. Likewise, the existence of other federal tolling statutes does not compel a broad reading of Congress' Article III powers particularly where the other statutory schemes were enacted under Article I authority. Finally, the petitioner's claim that the ruling below somehow effects a due process violation or raises other similar constitutional infirmities is also unavailing. The system of dual federalism in this nation creates a framework where a litigant's choice of forum, as a practical matter, can be limited. That limitation, however, does not cause any constitutional deprivation. Even where Section 1367(d) is not applicable to States and their political subdivisions, a civil rights plaintiff still retains the ability to seek relief in federal court, state court, or both.

The South Carolina Supreme Court made no attempt to avoid the constitutional issue presently before this Court. In a case decided last term, *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), the Minnesota Supreme Court had tackled a similar constitutional question. Yet, on appeal, this Court avoided the constitutional question by applying the clear statement rule of statutory construction to Section 1367(d). This Court has the same option available in this case. Section 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against any political subdivision such as the respondent. More specifically, there is no specific or unequivocal intent expressed in the statute to suggest that Congress intended to abrogate the sovereign immunity enjoyed by a political subdivision under state law and as applied to state law claims litigated in state court. Thus, as in *Raygor*, this Court may



resolve this case by concluding that Section 1367(d) is not applicable to nonconsenting States as well as nonconsenting political subdivisions of the States.

## ARGUMENT

The South Carolina Supreme Court ruled that the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d), is in violation of the Tenth Amendment as applicable to a political subdivision of the State of South Carolina. In ruling on the respondent's Tenth Amendment challenge, the South Carolina Supreme Court analyzed the source and scope of congressional authority and concluded that "Congress exceeded its constitutional authority in enacting § 1367(d) to the extent it interferes with the States' sovereignty to establish the conditions upon which tort actions may be maintained against political subdivisions." *Jinks v. Richland County*, 349 S.C. 298, 563 S.E.2d 104, 108 (2002). (Pet. App. A at 10a). The South Carolina Supreme Court was correct in its analysis.

### I. THE APPLICATION OF SECTION 1367(d) TO A POLITICAL SUBDIVISION OF THE STATE OF SOUTH CAROLINA EXCEEDS CONGRESS' AUTHORITY UNDER ARTICLE III AND CONTRAVENES THE TENTH AMENDMENT.

Section 1367(d) represents a unique and troublesome intrusion by the federal government into a state's sovereign authority both to regulate the practice and procedure within its state courts but, more importantly, to govern the scope of governmental immunity for purely state law claims. Section 1367(d) raises legitimate questions of congressional authority under Article III and the Necessary and Proper Clause as well as questions of constitutionality under the Tenth Amendment.

### A. In enacting Section 1367(d), Congress lacked the power to abrogate the respondent's sovereign immunity under state law from state claims litigated in a state court.

In enacting Section 1367(d) and sanctioning its application to state governmental entities such as the respondent, Congress impermissibly infringed upon state sovereignty. The petitioner and the United States focus strictly on whether Congress has the power to toll a state statute of limitations as applied to a state law claim in a state court. That is not the precise question at stake in this case. Because the defendant is a governmental entity, this case raises not only the question of whether Congress may toll a state statute of limitations, but more precisely, whether Congress has the power to expand a State's limited waiver of sovereign immunity for both a State and its political subdivisions.

As determined by the South Carolina Supreme Court, the two-year statute of limitations at issue is part and parcel of the waiver of sovereign immunity by the State of South Carolina for the State and its political subdivisions. As the court explained in the decision under review, all governmental entities in South Carolina enjoyed sovereign immunity until 1985. In that year, the South Carolina Supreme Court abolished sovereign immunity. *See McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). In response, the South Carolina General Assembly enacted the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* (Supp. 2002), which reinstated and then waived sovereign immunity for the State and its political subdivisions with certain exceptions and limitations. "The Tort Claims Act provides a limited waiver of governmental immunity and delineates the conditions upon which a claimant may pursue actions against



the State and its political subdivisions." *Jinks*, 563 S.E.2d at 108. (Pet. App. A at 9a). In accordance with S.C. Code Ann. § 15-78-100(a), the Tort Claims Act requires that a state court action for damages "must be brought within two years of the date of loss." *Id.*[1] Thus, under South Carolina law, sovereign immunity for the State or a political subdivision is not waived unless the suit is filed within the prescribed two-year limitations period.

Last term in *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002), this Court explained:

> [W]ith respect to suits against a state sovereign in its own courts, we have explained that a State "may prescribe the terms and conditions on which it consents to be sued," and that "[o]nly the sovereign's own consent could qualify the absolute character of [its] immunity" from suit in its own courts.

534 U.S. at 543. (Citations omitted). In *Block v. North Dakota*, 461 U.S. 273 (1983), this Court held that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." 461 U.S. at 287. *See also United States v. Mottaz*, 476 U.S. 834, 841 (1986) (citing *Block*); *Alden v. Maine*, 527 U.S. 706, 749 (1999) ("... the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself"). Thus, the two-year limitations period set forth in S.C. Code Ann.

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1. In addition to S.C. Code Ann. § 15-78-100(a) which sets forth certain conditions for suit, S.C. Code Ann. § 15-78-110 sets forth a statute of limitations providing that the suit must be commenced within two years of the date of loss. The two statutory provisions are, in essence, identical in application.

§ 15-78-100(a) is not only a deadline for the filing of suit but more importantly is a limitation on the State's waiver of sovereign immunity for itself and its political subdivisions.

In the present case, the state court action was filed after the two-year limitations period had expired, and as a result, the respondent enjoyed sovereign immunity from suit when this action was filed. Thus, the effect of applying Section 1367(d) to a South Carolina governmental entity such as Richland County was to enlarge the State's limited waiver of sovereign immunity. Under the reasoning of *Block* and *Raygor*, that alone constitutes impermissible interference with state sovereignty in contravention of the Tenth Amendment.

The Tenth Amendment provides that "the powers not delegated to the United States, are reserved to the States respectively or to the people." *See* U.S. Const., Amend. X. The analysis to be applied has been viewed in two ways. This Court has examined in some cases whether Congress has acted in accordance with its delegated powers under Article I or some other affirmative grant of power. In other cases, the Court has examined whether a congressional enactment has intruded upon principles of state sovereignty. In *New York v. United States*, 505 U.S. 144 (1992), this Court observed:

> In a case . . . involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state



> sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

505 U.S. at 156. Although the Tenth Amendment is "essentially a tautology," this Court must nonetheless carefully examine "whether an incident of state sovereignty is protected by a limitation" on powers delegated to Congress. 505 U.S. at 157.

Proponents of the constitutionality of 28 U.S.C. § 1367(d), including the petitioner and the United States in this case, have concluded that Congress possessed the power to enact the statute under Article III in conjunction with the Necessary and Proper Clause. *See Blinn v. Florida Department of Transportation*, 781 So. 2d 1103 (Fla. Ct. App. 2000) (review of this issue was not sought in Florida Supreme Court); *Estate of Fennell v. Stephenson*, 137 N.C. App. 430, 528 S.E.2d 911 (2000), *rev'd in part*, 354 N.C. 327, 554 S.E.2d 629 (2001) (North Carolina Supreme Court did not address constitutionality of § 1367(d)). Under Article III, Congress was granted the power to establish the "inferior courts" of the federal judicial branch and to enact regulations establishing those courts' jurisdiction. However, Article III does not explicitly convey power to Congress to legislate procedural rules for state courts adjudicating purely state law claims. As a result, the proponents of Section 1367(d) are forced to rely upon the Necessary and Proper Clause, which this Court has previously described as "the last, best hope of those who defend ultra vires congressional action." *Printz v. United States*, 521 U.S. 898, 923 (1999).

Proponents of Section 1367(d) may argue that Congress is only creating a procedural framework by which federal courts may decline to exercise supplemental jurisdiction. Nonetheless, the ultimate effect of Section 1367(d) is an unprecedented and unconstitutional expansion of congressional power over the States and their political subdivisions. Specifically, as discussed above, the application of Section 1367(d) against the States and their political subdivisions allows for the extension of a limited waiver of sovereign immunity, at least, in the case of the State of South Carolina and its political subdivisions. It represents not simply the tolling of a traditional statute of limitations but the enlargement of the time in which the State of South Carolina has agreed to waive its sovereign immunity not only for itself but also for its political subdivisions.

The respondent is cognizant of the fact that this Court in *Raygor*, *supra*, has ruled that Section 1367(d) has no application to the States. The *Raygor* Court explained that "although we have not directly addressed whether federal tolling of a state statute of limitations constitutes an abrogation of state sovereign immunity with respect to claims against state defendants, we can say that the notion at least raises a *serious constitutional doubt*." 534 U.S. at 543. (Emphasis added). Although this Court reserved judgment on the constitutionality of Section 1367(d) where the defendant is not a State, 534 U.S. at 547, the respondent submits that those same "serious constitutional doubts" are equally applicable where, as in the present case, the defendant is a political subdivision of a State.

The petitioner and the United States argue that, although Congress may not have the authority to waive a nonconsenting State's sovereign immunity in state court,



Congress does have that authority with respect to political subdivisions such as Richland County. They point to the following language from *Alden*, *supra*, where this Court wrote that an "important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." *Alden*, 527 U.S. at 756. This reliance on *Alden* is misplaced. *Alden* did not address Congress' authority to allow a *state* law claim to be asserted against a State's political subdivision in a state court where state law sovereign immunity would bar the claim, which is precisely the issue here. Instead, *Alden* only teaches that Congress may authorize a *federal* law claim, in that case a Fair Labor Standards Act (FLSA) claim, to proceed against a lesser governmental entity in a state court regardless of whether the lesser governmental entity asserts sovereign immunity based upon state law principles.[2] In contrast, according to *Alden*, a FLSA claim against the State of Maine in its own courts is barred by principles of federal constitutional immunity.

Thus, the decision of the South Carolina Supreme Court in the case at bar is not in conflict with *Alden*. Neither the lower court's decision nor the respondent's position is premised on a claim of Eleventh Amendment immunity.

2. The case of *Felder v. Casey*, 487 U.S. 131 (1988), is distinguishable on a similar basis. In *Felder*, this Court ruled that a Wisconsin notice-of-claim statute did not apply to federal civil rights claims brought under 42 U.S.C. § 1983 even where such claims were filed in state court. The Court described the notice-of-claim statute as "a substantive condition on the right to sue governmental officials and entities," 487 U.S. at 152, and as a result, state substantive law could not alter the requirements to state a claim based solely on federal law.

Instead, the respondent contends that it is entitled to sovereign immunity derived under state law, and Congress has no authority to abrogate state law sovereign immunity as applied to purely state law claims litigated in state courts.

The position taken by the petitioner and the United States stems from a mistaken belief that sovereign immunity is the same as Eleventh Amendment immunity. They reason that Richland County, as a political subdivision, is not entitled to Eleventh Amendment immunity because it is not an arm of the State. Accordingly, as they maintain, Richland County cannot claim sovereign immunity in any context. That is clearly incorrect. As this Court discussed at length in *Alden*, Eleventh Amendment immunity "is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment." 527 U.S. at 713. The Court further explained that:

> [A]s the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

*Id.* Thus, the scope and extent of federal constitutional immunity is not obviously limited to Eleventh Amendment immunity.[3]

3. In the recent case of *Federal Maritime Commission v. South Carolina Ports Authority*, 535 U.S. 743, 122 S. Ct. 1864 (2002), this Court held that "States, upon ratification of the Constitution, did not (Cont'd)



Moreover, as this Court in *Alden* explains, sovereign immunity is a creature of the English common law; it long pre-dated the ratification of the Constitution. *See Alden*, 527 U.S. at 715 ("[w]hen the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts"). "[T]he doctrine that a sovereign could not be sued without its consent was universal in States when the Constitution was drafted and ratified." 527 U.S. at 715-16. Principles of sovereign immunity which pre-date the Constitution protected not just the arms of the State from suit by private parties, but protected all forms of government including lesser governmental entities. History does not support any notion that States were immune from suit while municipalities and counties were subject to suit by private parties without their consent. Thus, it is beyond reasonable dispute that local governmental entities, such as Richland County, enjoy sovereign immunity derived from the common law and more specifically existing state law.[4]

Thus, contrary to the positions taken by the petitioner and the United States, the absence of Eleventh Amendment immunity for local governmental entities is not dispositive of the issue before this Court. While Congress has the power

(Cont'd)
consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.' An integral component of that 'residuary and inviolable sovereignty' retained by the States is their immunity from private suits." 122 S. Ct. at 1870. (Citations omitted).

4. The United States acknowledges that "[w]hether and to what extent respondent and other local governmental bodies enjoy 'sovereign immunity' is a matter of *state* law is for South Carolina officials to decide." *See* U.S. Br. at 32.

under Article I and Section 5 of the Fourteenth Amendment in certain instances to waive a local governmental entity's sovereign immunity for claims brought under *federal* law, Congress cannot abrogate sovereign immunity as derived under state law and as applied strictly to *state* law claims. Yet, that is precisely what will occur if Section 1367(d) is applied to the respondent in this case; the limited waiver of sovereign immunity under *state* law and as applied strictly to *state* law claims will be extended beyond what the State of South Carolina provided for by its laws.

Moreover, the absence of Eleventh Amendment immunity does not imply that local governmental entities do not enjoy the protection of the Tenth Amendment. In *Printz v. United States*, 521 U.S. 898 (1999), this Court found certain provisions of the Brady Handgun Violence Prevention Act to be in violation of the Tenth Amendment. Specifically, the Court ruled unconstitutional those provisions "commanding state and *local law enforcement officers* to conduct background checks on prospective handgun purchasers." 521 U.S. at 902. (Emphasis added). In fact, the petitioners in *Printz* were local law enforcement officers. The Court thus found that the Tenth Amendment also preserved the sovereignty of local governments.

In ruling that the Brady Handgun Violence Prevention Act violated the Tenth Amendment, the *Printz* Court explained that a law is not "proper" where it "violates the principle of state sovereignty." 521 U.S. at 924. In the case at bar, the South Carolina Supreme Court ruled that Section 1367(d) was "necessary" as "an aid to the exercise of federal jurisdiction." *Jinks*, 563 S.E.2d at 107. (Pet. App. A at 7a).[5] Nonetheless,

5. Although the South Carolina Supreme Court found that Section 1367(d) was "necessary," the respondent does not concede (Cont'd)



because Section 1367(d) substantially intrudes upon state sovereignty by extending the State's limited waiver of sovereign immunity for political subdivisions, the tolling provision cannot be deemed "proper" within the context of the Necessary and Proper Clause. In sum, Section 1367(d) is in violation of the Tenth Amendment as applied against the respondent in this case, and there is no power delegated to Congress that permits the abrogation of the respondent's sovereign immunity under state law and as applied to state law claims litigated in state courts.

### B. Congress' attempt to alter the application of a state law statute of limitations to be applied in state courts to state law claims represents an unconstitutional intrusion upon state sovereignty.

As indicated above, the two-year limitations period provided in the South Carolina Tort Claims Act is a limitation on the State's waiver of sovereign immunity for itself and its political subdivisions. That limitations period is also treated under state law as a traditional statute of limitations. *See* S.C. Code Ann. § 15-78-110 (Supp. 2002).

This Court has recognized that statutes of limitations have long been deemed to be "procedural restrictions fashioned by each jurisdiction for its own courts." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988). "The period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government,

(Cont'd)
that point. However, because Section 1367(d) is not "proper," that issue alone is dispositive of the statute's constitutionality in the present context.

consulting its own interest and convenience." *Id.*, *citing* 2 J. Kent, *Commentaries on American Law* 462-463 (2d ed. 1832). The Court has observed that "[s]tatutes of limitations are not simply technicalities" but are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). In *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839), this Court explained that "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property." 38 U.S. (13 Pet.) at 327.

Thus, a statute of limitations enacted under state law is a significant component of state sovereignty. It is entirely within a state's prerogative to determine generally the practice and procedure within its own courts but also in more specific terms to set any deadlines for the prosecution of state court claims in those state courts. In fact, it appears that the petitioner agrees that a statute of limitations on a state law claim effects principles of state sovereignty. The petitioner acknowledges that a compelled waiver of a state statute of limitations by a federal district court "invade[s] state sovereignty to some degree." Pet. Br. at 15. The United States also concedes that a statute of limitations is a "state policy choice." U.S. Br. at 27.

Article III confers the power on Congress to create the "inferior courts" and to regulate their jurisdiction. However, in no context are state courts considered "inferior courts" subject to regulation and control by congressional authority. State courts derive their authority from state law and state constitutions. They are distinctly separate from federal courts, although they can and do exercise concurrent jurisdiction. As Chief Justice Marshall observed, "[t]he state courts are



not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court . . . They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government." *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807). Because Congress' Article III power is limited to inferior federal courts, Congress clearly lacks authority to create state courts, regulate their jurisdiction, or establish rules of practice and procedure therein.

This conclusion has been recognized in several decisions of this Court. For instance, in *Mondou v. New York, New Haven, & Hartford Railroad Co.*, 223 U.S. 1 (1912), this Court explained that "there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure . . ." 223 U.S. at 56. More recently, in *Felder v. Casey*, 487 U.S. 131 (1988), this Court recognized that "[n]o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." 487 U.S. at 138.

Contrary to the claims of petitioner and the United States, Section 1367(d) does not govern procedure within the federal courts. It does not toll the statute of limitations for a federal claim. Instead, it attempts to toll the statute of limitations for a state claim being asserted in a state court. In practical terms, Section 1367(d) does not regulate federal court procedure and practice; rather it regulates state court procedure and practice. As a result, it is incorrect to view Article III as a valid source of authority for a law regulating state courts.

Moreover, Section 1367(d) constitutes an unconstitutional intrusion on state sovereignty regardless of whether the tolling

of a statute of limitations is deemed procedural or substantive law. Historically, this Court has held that Congress lacks the power to interfere with or disregard state statutes of limitations. In *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), this Court ruled that a state statute of limitations is substantive state law that a federal court hearing a state law claim under diversity jurisdiction is bound to apply under the *Erie* doctrine.[6] Later, in *Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530 (1949), this Court held that state law governing the time of commencement of an action must be applied in adjudicating a state law claim. The *Ragan* Court explained that "[w]e cannot give the [claim] longer life in federal court than it would have had in the state court without adding something to the cause of action." 337 U.S. at 533-34. The Court concluded that commencement rules are an "integral part" of the statute of limitations, and hence, state law must govern. *See also Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The tolling provisions that limit application of a statute of limitations are likewise an "integral part" of the statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 269 n.17 (1985) ("[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling . . .").

This case law reflects that a state statute of limitations and its tolling provisions must be applied in federal cases where state law claims are adjudicated. This case law further reflects that Congress lacks the power to interfere with or override state law with respect to a state statute of limitations. Nonetheless, Section 1367(d) was expressly enacted to interfere with and override the application of a state statute of limitations by a state court in a state law action. This

6. The *Erie* doctrine originated in *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938).



enactment is not only in contravention of the historical scope of congressional power in this area but is also clearly contrary to decades of Supreme Court precedent governing the practice and procedure in federal courts.

In *Erie Railway Co. v. Tompkins*, 304 U.S. 64 (1938), this Court held that, as a matter of constitutional law, the law to be applied by the federal court in diversity cases is state substantive law. The *Erie* Court explained its rationale:

> Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.
>
> * * *
>
> [T]he constitution of the United States . . . recognizes and preserves the autonomy and independence of the states — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.

304 U.S. at 78-79. Importantly, the *Erie* doctrine represents a balancing of Article III powers and the Tenth Amendment.

This Court recognized that state sovereignty mandates no interference by Congress or the federal judiciary with state substantive law or the workings of a state judiciary. Consequently, it is most evident that Section 1367(d) does precisely what *Erie* rejects — it is Congress' attempt to declare or limit the application of state substantive law. Actually, in enacting Section 1367(d), Congress takes this a step further and attempts to limit state substantive law with respect to state law claims actually litigated in state courts.

Section 1367(d) has breathed life into state law claims brought in state court which would otherwise be barred by operation of state law. Section 1367(d) has resurrected those state claims in contravention of state sovereignty. In short, Congress should not be permitted to facilitate clearing federal dockets of state law claims by usurping the state's sovereignty and dictating that state courts hear cases that are not otherwise cognizable in state court.

### C. The case law on which the petitioner and the United States rely to support the constitutionality of Section 1367(d) is readily distinguishable and does not suggest that Congress has the power to abrogate state law sovereign immunity as applied in a state law claim litigated in a state court.

The petitioner and the United States have cited several cases of this Court for the proposition that Congress has the authority to legislate a tolling of a state statute of limitations. These cases are readily distinguishable from the present case on several bases. First and foremost, none of the cited cases addressed the precise issue raised in this litigation where the statute of limitations established not only the deadline for filing, but more importantly, the extent of the State's limited



waiver of sovereign immunity. For the most part, these cases address some form of equitable tolling that was recognized and applied to cases pending in federal court. The application of equitable tolling, however, has never been an issue in this case.

The case of *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965), which is cited in the petitioner's brief, is purely an equitable tolling case. An action was commenced under the Federal Employers' Liability Act (FELA) in state court. That action was dismissed because venue was improper, and eight days later, the plaintiff re-filed in federal court. While the action was pending in state court, the three-year statute of limitations under FELA had expired. This Court ruled that "the FELA limitation period is not totally inflexible, but, under appropriate circumstances, it may be extended beyond three years." 380 U.S. at 427. Consequently, this Court applied the doctrine of equitable tolling to extend the statute of limitations. *Burnett* involved the application of a *federal* statute of limitations to a *federal* cause of action that was adjudicated in a *federal* court. This Court simply recognized that federal law permitted the equitable tolling of a federal statute of limitations.

The petitioner's reliance on the case of *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), is similarly misplaced. This Court explained that the action "was not a common-law action but one of statutory origin to enforce the award of a [federal] administrative tribunal." 321 U.S. at 348. The Court did not find the state law statute of limitations to be applicable. Instead, the Court concluded that "[a] special two-year limitation from the time of award was prescribed by the federal statute, and this action was brought within that period." *Id.* In dicta, the Court

reasoned that a state statute of limitations should not bar a claim where the limitations period elapsed during the pendency of a federal administrative claim. However, the Court applied what is in essence an equitable tolling approach to the question. Moreover, *Railroad Telegraphers* was a *federal* action adjudicated in *federal* court which further distinguishes it from the present case.

The petitioner also cites the case of *Hanger v. Abbott*, 73 U.S. 532 (1867), where this Court applied the doctrine of equitable tolling to a claim between citizens of New Hampshire and Arkansas which accrued during the Civil War. The Court reasoned that the right to sue was suspended during the Civil War, and as a result, the applicable statute of limitations was tolled during the war. In contrast to the present case, *Hanger* was adjudicated in a federal court and was pre-*Erie* meaning that the Court was not required necessarily to apply the applicable Arkansas law on tolling. It is unclear from the opinion whether the doctrine of equitable tolling that was applied had originated from the federal common law or from state law.

Interestingly, in *Hanger*, *supra*, the Court avoided basing its decision on an Act of Congress from 1864 entitled "An Act In Relation To The Limitation Of Actions In Certain Cases," 13 Stat. 123 (1864).[7] The constitutionality of that Act, however, was squarely presented to the Court in *Stewart v. Kahn*, 78 U.S. 493 (1870), a case not cited by the petitioner but raised by the United States in its brief. *See* U.S. Br. at

7. In *Hanger*, *supra*, the Court wrote: "Plaintiffs also rely upon the act of Congress of eleventh of June, 1864, as being sufficient to take the case out of the operation of the statute, but it is not necessary to decide that point in this case, and we express no opinion upon the subject." 73 U.S. at 542.



28-29. Congress recognized that civil and criminal defendants in the Southern states were potentially unable to be served with legal process by reason of the Civil War. Accordingly, Congress enacted legislation providing that "the time during which such [defendants] shall be beyond the reach of legal process shall not be deemed or taken as any part of the time limited by law for the commencement of such action." 78 U.S. at 504. In *Stewart*, the Court ruled that this tolling statute applied to cases pending in both federal and state courts. The Court concluded that Congress was authorized to enact this tolling statute not based upon its Article III powers but rather based on its Article I war powers. The Court explained further as follows:

> Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined.
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> * * *
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> . . . the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority.

78 U.S. at 506-507.

Thus, *Stewart* does not provide support for the petitioner's argument that Congress is authorized under Article III to toll a state law statute of limitations applied to a state law claim adjudicated in a state court. To the contrary, such a unique statute was found constitutional in *Stewart* on the basis of Congress' war powers alone. This Court did not find that Congress was otherwise authorized to intrude upon the practice and procedure in state courts on the basis of its Article III powers. It is also worth noting that the *Stewart* Court did not address specifically the effect on state sovereignty. More specifically, the Court did not address the scenario presented in the case at bar where the federal statute not only tolled a statute of limitation but also extended the State's limited waiver of sovereign immunity. That would not have been an issue in 1870, at which time the States and their political subdivisions enjoyed absolute sovereign immunity from suit. In sum, *Stewart* cannot be read as authority for the enactment of Section 1367(d), particularly where the critical questions of state sovereignty were not at issue.

**D. The existence of other federal tolling statutes or the power to stay certain state court proceedings does not provide support for Congress' exercise of its Article III powers in enacting Section 1367(d).**

The petitioner has suggested that the constitutionality of other federal statutes allowing for tolling of state statutes of limitations and stays of state court actions is called into doubt by the decision of the South Carolina Supreme Court. However, the petitioners are reading the lower court's decision much too broadly. The South Carolina Supreme Court has held only that Congress lacked the authority under Article III and the Necessary and Proper Clause to toll the



statute of limitations and extend the limited waiver of sovereign immunity enjoyed by governmental entities under South Carolina law. The lower court did not decide nor even suggest that Congress lacks authority to provide for the tolling of a statute of limitations in other contexts such as the Soldiers' and Sailors' Civil Relief Act of 1940 or the Y2K Act.

Quite frankly, in the appropriate case where the constitutionality of those Acts may be challenged, it will be incumbent on the courts to examine the source of the congressional power for each respective piece of legislation and its effects on state sovereignty. In certain instances, Congress may have acted within its authority and not in violation of state sovereignty. For example, in enacting the Soldiers' and Sailors' Civil Relief Act of 1940, Congress was acting within its Article I powers to provide for the nation's military and its governance. Similarly, in enacting the Y2K Act, Congress was acting pursuant to its Article I commerce power.

The petitioner also suggests that the constitutionality of the federal judiciary's authority to stay certain state court proceedings is called into doubt by the lower court's decision. Again, that decision did not address such issues. However, in the appropriate case, the reviewing court must examine the source of congressional authority for allowing a federal court or federal law to stay state court proceedings. For instance, the petitioner cites the automatic stay of all judicial proceedings under the Bankruptcy Code, 11 U.S.C. § 362(a). The automatic stay, however, has been held constitutional because Congress possesses Article I powers to legislate in the bankruptcy area. *See, e.g., Kalb v. Feuerstein*, 308 U.S. 433 (1940).

In short, the existence of other federal tolling statutes or the power to stay certain state court proceedings does not provide support for Congress' exercise of its Article III powers in enacting Section 1367(d). Conversely, a finding that Congress exceeded its authority under Article III does not suggest that Congress lacks authority under an enumerated Article I power to address what have historically been the consequences of extraordinary events such as war or commercial crisis. Most importantly, the existence of other federal tolling statutes or the power to stay certain state court proceedings is not determinative of the issue specifically decided by the lower court in this case — whether Section 1367(d) may enlarge the limited waiver of sovereign immunity enjoyed by States and their political subdivisions under state law and as applied to state claims litigated in state courts.

**E. Contrary to the petitioner's assertions, the ruling below will not bar or discourage civil rights litigants from prosecuting their claims.**

Throughout its brief, the petitioner attempts to shift the focus from the constitutionality of Section 1367(d) to its utility. The petitioner argues the many perceived benefits of Section 1367(d) to the orderly operation of the federal courts and to the preservation of state law claims asserted by civil rights plaintiffs. Yet, the issue is not whether Section 1367(d) serves a beneficial purpose. Instead, the issue is whether Congress had the authority to toll a state law statute of limitations and to extend the limited waiver of sovereign immunity for state law claims adjudicated in state court. Simply because a statute may have a beneficial purpose does not mean that Congress had the authority to enact the law or apply the law to a certain class of persons or entities.



In particular, the petitioner complains that without Section 1367(d) a civil rights litigant will be essentially barred from bringing both federal and state law claims in a federal forum. She reasons that a litigant will not want to risk filing the action in federal court where her state law claims may be dismissed without prejudice after the statute of limitations has already expired. There exist, however, a number of solutions for the petitioner's "access to justice" concerns. It is worth noting that Section 1367(d) was enacted in 1990, and prior to that time, civil rights litigants enjoyed a constitutionally adequate level of access to justice.

Whether Section 1367(d) applies to a case or not, a plaintiff has the ability to bring all of his or her claims in the same forum. A state court possesses concurrent jurisdiction to hear federal constitutional claims under 42 U.S.C. § 1983. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) ("federal and state courts have concurrent jurisdiction over actions brought under § 1983"). Likewise, a civil rights plaintiff is not barred from commencing her federal claims and state claims together in a federal court action. But, if there exists a statute of limitations concern, the plaintiff may commence separate actions in federal and state courts and may potentially seek to stay one of the actions if desired. The petitioner raises concerns about claim-splitting; however, there is no South Carolina law prohibiting claim-splitting. Indeed, in this very case, the petitioner did not wait until her federal action was fully adjudicated through appeal before pursuing a second action. While an appeal was pending in the Fourth Circuit Court of Appeals, she proceeded with filing and prosecuting her state court action. Her state court action was not barred on the basis of claim-splitting.

Furthermore, similar concerns as raised by the petitioner have previously been rejected by this Court in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). The plaintiffs in that case urged this Court not to apply the Eleventh Amendment to supplemental state claims brought against state officials. They argued that "'considerations of judicial economy, convenience and fairness to litigants' counsel against a result that may cause litigants to split causes of action between state and federal courts." 465 U.S. at 121. In response, this Court recognized that "[i]t may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or bifurcation of claims. *That is not uncommon in this area*." 465 U.S. at 122. (Emphasis added). This Court further concluded: "That a litigant's choice of forum is reduced 'has long been understood to be a part of the tension inherent in our system of federalism.'" 465 U.S. at 123, *citing Employees v. Missouri Public Health & Welfare Dept.*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring in result).

**F. The decision of the court below does result in a violation of due process and does not discriminate against litigants asserting federal constitutional rights.**

In addition to making policy arguments in favor of tolling state court claims while pending in federal court, the petitioner argues that the decision by the South Carolina Supreme Court constitutes a violation of due process or at least unconstitutionally impedes a litigant's right of access to a federal forum. In this same vein, the petitioner suggests that the lower court's decision somehow discriminates against litigants asserting federal constitutional rights. These arguments lack merit.



In *Raygor*, *supra*, this Court has already ruled that Section 1367(d) does not apply against a State to toll a statute of limitations or enlarge the waiver of state law sovereign immunity. Consequently, when seeking to bring a federal civil rights claim against a State or state official coupled with a state law claim arising from a common nucleus of operative facts, a litigant currently faces the same exact "access to justice" issues raised by the petitioner here. If the plaintiff brings all of the claims in federal court, the state claims may be dismissed after the statute of limitations expires, thereby resulting in a loss of the opportunity to litigate the state claims in state court. To avoid that possibility, the plaintiff may commence both claims in state court alone or may split his claims and file in both courts. As claimed by the petitioner, this is the "dilemma" that violates due process and discriminates against litigants asserting federal constitutional rights. Yet, this Court has already implicitly rejected those same arguments in *Raygor*. If the absence of a thirty-day tolling window is not unconstitutional in litigation against a State, there is no reasonable argument that can be made that the absence of the same thirty-day tolling window is unconstitutional relative to claims against a political subdivision. In effect, the due process and discrimination arguments did not require a different result in *Raygor*, and the same arguments do not require a different result here.

Litigants are constantly compelled to make choices and strategy decisions. One of the first such decisions is typically choice of forum. A civil rights plaintiff must decide whether to commence her claim in federal court, state court, or both. A civil rights defendant must decide whether to remove a federal claim brought in state court. There are obviously consequences that accompany those decisions. For instance, a State defendant may be forced to waive Eleventh

Amendment immunity in order to obtain a federal forum for declaratory or injunctive relief claims. *See Lapides v. Bd. of Regents of the University System of Georgia*, 535 U.S. 613 (2002). Likewise, a plaintiff may be required to place her state claims at risk of dismissal in order to pursue a federal forum. The fact that a litigant is confronted with these choices and resulting consequences does not violate due process and clearly is not discriminatory. As the *Pennhurst* Court recognized, a limitation on choice of forum is a natural and expected result of "our system of federalism." *Pennhurst*, 465 U.S. at 123. That limitation does not rise to the level of a constitutional deprivation.

## II. THE LACK OF A CLEAR STATEMENT BY CONGRESS OF ITS INTENT FOR SECTION 1367(d) TO APPLY TO STATES AND THEIR POLITICAL SUBDIVISIONS ALLOWS THIS COURT TO AVOID THE CONSTITUTIONAL QUESTION RULED UPON BY THE COURT BELOW.

The respondent urges the affirmance of the decision of the South Carolina Supreme Court on the basis that Section 1367(d) violates the Tenth Amendment as applicable to a political subdivision of the State of South Carolina. Nonetheless, the respondent further recognizes that this Court need not reach the constitutional question issue just as the Court did not reach that similar question in *Raygor*, *supra*. This Court may affirm in result only and find as a matter of statutory construction that Section 1367(d) is not applicable to political subdivisions just as the *Raygor* Court ruled that it is not applicable to the States themselves.



The South Carolina Supreme Court did not apply the clear statement rule of statutory construction, but in light of this Court's decision in *Raygor*, that court could have construed Section 1367(d) so as to avoid a difficult constitutional question. *See Raygor*, 534 U.S. at 549 (Ginsburg, J., concurring) ("statutes should be construed so as to avoid difficult constitutional questions"). As discussed in *Raygor*, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." 534 U.S. at 543. "[T]he clear statement principle reflects 'an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" 534 U.S. at 544, *citing Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

Clearly, the application of Section 1367(d) affects the constitutional balance between States and the federal government. In *Raygor*, this Court explained:

> [A]llowing federal law to extend the time period in which a state sovereign is amenable to suit in its own courts at least affects the federal balance in an area that has been a historic power of the States, whether or not it constitutes an abrogation of state sovereign immunity.

534 U.S. at 544. In applying the clear statement rule, this Court concluded that "§ 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States." 534 U.S. at 545. Likewise, it may be said that Section 1367(d) reflects no specific or unequivocal intent to toll the statute of limitations

for claims asserted against any political subdivision such as the respondent. More specifically, there is no specific or unequivocal intent expressed in the statute to suggest that Congress intended to abrogate the sovereign immunity enjoyed by a political subdivision under state law and as applied to state law claims litigated in state court. Hence, Congress has not made its intention "unmistakably clear" to apply the tolling provision to political subdivisions where the result is the abrogation of state law sovereign immunity — a clear intrusion into the historic powers of a State.

In short, this Court need not reach the constitutional question ruled upon by the South Carolina Supreme Court. As in *Raygor*, the application of the clear statement rule leads to the conclusion that just as Section 1367(d) is not applicable to nonconsenting States, it is likewise not applicable to nonconsenting political subdivisions of the States.



## CONCLUSION

For the foregoing reasons, the respondent submits that the decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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